IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JOHN BRYAN HERRING,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11164
Trial Court No. 3AN-09-7412 CR

MEMORANDUM OPINION

No. 6360 — July 20, 2016

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael L. Wolverton, Judge.

Appearances: Kevin T. Fitzgerald, Ingaldson Fitzgerald, P.C., Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Bolger, Supreme Court Justice.*

Judge MANNHEIMER.

In our previous decision in this case, *Herring v. State*, Alaska App. Memorandum Opinion No. 5947 (May 8, 2013), 2013 WL 1933100, we left one issue

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

unresolved: whether Herring's case should be referred to the statewide three-judge sentencing panel, to allow Herring to be sentenced outside the normal presumptive range for his offense.

Rather than resolving the question of whether Herring's case should be referred to the three-judge panel, we remanded Herring's case to the superior court, directing that court to re-evaluate this question in light of our recently issued decision in *Collins v. State*, 287 P.3d 791 (Alaska App. 2012) — a case where this Court announced two new non-statutory mitigating factors that applied to the sentencing of felony sex offenders.

Less than two months after we issued our decision in *Herring*, and while Herring's case was on remand to the superior court, the legislature responded to our decision in *Collins* by enacting SLA 2013, ch. 43. In section 1 of this session law, the legislature declared that *Collins* had been wrongly decided — that the two non-statutory mitigators announced in *Collins* were inconsistent with pre-existing sentencing law and legislative intent. And in section 23 of this session law, the legislature amended AS 12.55.175 (the statute defining the three-judge panel's sentencing authority) by adding a new subsection (f) that forbids the three-judge panel from reducing a sentence based on either of the two mitigating factors announced in *Collins*:

> (f) A defendant being sentenced for a sexual felony under AS 12.55.125(i) may not establish, nor may the three-judge panel find under (b) of this section or any other provision of law, that manifest injustice would result from imposition of a sentence within the presumptive range based solely on the claim that the defendant, either singly or in combination, has
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> (1) prospects for rehabilitation that are less than extraordinary; or

(2) a history free of unprosecuted, undocumented, or undetected sexual offenses.

The superior court now asks this Court to clarify whether it should proceed to re-evaluate Herring's case under *Collins* (as we directed the court to do), or whether the legislature's enactment of SLA 2013, ch. 43 has rendered any re-evaluation moot.

In response to the superior court's question, we ourselves have re-evaluated the record in Herring's case. Based on that record, we now rescind our prior directive to the superior court. As we explain in this opinion, we conclude that even under the law as stated in *Collins*, the superior court was not required to send Herring's case to the three-judge sentencing panel.

A recapitulation of the facts of Herring's case

In April 2009, Herring and his then-wife, J.R., divorced. On the morning of June 30, 2009, Herring purchased duct tape, a bag of zip ties, a container of lubricating jelly, and a box of tampons. Later that day, when J.R. stopped by Herring's house to pick up some sports equipment for their son, Herring assaulted J.R. — strangling her until she lost consciousness, then binding her with the zip ties and the duct tape.

Herring drove J.R. to a secluded area of the Anchorage hillside. There, over the course of more than an hour, Herring raped her three times. Herring eventually allowed J.R. to get out of the vehicle to urinate. While she was outside the vehicle, she flagged down a passing motorist and escaped.

While J.R. was being treated by medical personnel and interviewed by the police, Herring (who was still at large) sent text messages to J.R. saying that he did not want to spend 25 years in prison for what he had done to her. Herring justified his

actions by asserting that J.R. had slept with someone else while they were still married. Herring then encouraged J.R. to remarry him, so that she would not have to testify against him.

Based on this conduct, Herring was indicted for kidnapping and several counts of first- and second-degree sexual assault. The case was ultimately resolved by a plea bargain: Herring pleaded guilty to one count of first-degree sexual assault, and the State dismissed the kidnapping charge and the other sexual assault charges.

According to J.R.'s testimony at the sentencing hearing, Herring's first wife left him after he attacked her. (Apparently, no criminal charges were pursued in connection with this earlier incident.) Herring's relationship with J.R. was also marked by violence. At one point, J.R. obtained a restraining order against Herring. In 2008, Herring used a pipe wrench to destroy J.R.'s laptop computer. And Herring warned J.R. that she should "sleep with one eye open".

In May 2009 (the month following their divorce, and the month before Herring committed the crimes in this case), J.R. suspected that Herring gave her a "roofie" (*i.e.*, a date-rape drug) and took digital photos of her naked body while she was unconscious. When J.R. later confronted Herring about this, he promised that he would delete the photos and never touch her again.

Following Herring's divorce from J.R., he sought treatment for anxiety and depression — first at Providence Alaska Medical Center, and then at a treatment facility in Arizona. Against medical advice, Herring left the Arizona facility on June 25, 2009. Five days later, he kidnapped and raped J.R.

Herring was forty years old when he committed these crimes. Because Herring was a first felony offender, he faced a presumptive sentencing range of 20 to 30 years' imprisonment for the offense of first-degree sexual assault. [1]

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[1] AS 12.55.125(i)(1)(A).

Herring conceded two aggravating factors under AS 12.55.155(c): (c)(1) (that the victim suffered physical injury), and (c)(18)(A) (that Herring's offense was committed against an ex-spouse). Because of these aggravating factors, the superior court was authorized to impose a sentence of up to 99 years' imprisonment. [2]

Herring proposed one mitigating factor under AS 12.55.155(d): mitigator (d)(3) — that his conduct was significantly affected by some degree of duress, coercion, or compulsion. Herring also proposed the non-statutory mitigating factor of extraordinary potential for rehabilitation. The superior court found that Herring had failed to prove either of these proposed mitigators.

The superior court also rejected Herring's argument that, given the facts of his case, the applicable presumptive range of 20 to 30 years' imprisonment was manifestly unjust, and that his case should therefore be referred to the statewide three-judge sentencing panel under AS 12.55.165.

Having made these findings, the superior court sentenced Herring to 35 years' imprisonment with 14 years suspended — *i.e.*, 21 years to serve.

Why we affirm Herring's sentence

In our initial decision in this case, we resolved one part of Herring's sentence appeal, by affirming the superior court's rejection of proposed statutory mitigator (d)(3) (duress, coercion, or compulsion). However, we did not resolve Herring's claim that the superior court should have referred his case to the statewide three-judge sentencing panel.

Herring argued that the superior court should send his case to the three-judge panel on two bases: first, that he had an extraordinary potential for rehabilitation,

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[2] AS 12.55.125(i) and AS 12.55.155(a)(2).

and second, that the lowest sentence he could receive in the absence of mitigators (the 20-year bottom of the applicable presumptive range) was manifestly unjust.

With regard to Herring's claim of extraordinary potential for rehabilitation, we noted that even though the sentencing judge indicated that Herring had a "high potential" for rehabilitation, and even though the judge declared that there was "significant evidence" indicating that Herring's crimes were "a one-off event", the judge also concluded that he did not know precisely "why this all happened" — and, for this reason, the judge declined to refer Herring's case to the three-judge panel on the basis of extraordinary potential for rehabilitation. [3]

In our first decision, we did not expressly resolve whether the judge's ruling on this point was error. Instead, we directed the judge to re-evaluate this issue, as well as Herring's claim that the lowest possible sentence was manifestly unjust, in light of our decision in *Collins*. [4] But we now conclude that we were mistaken in taking this approach.

In *Beltz v. State*, 980 P.2d 474 (Alaska App. 1999), this Court held that a sentencing court should not find that a defendant has extraordinary potential for rehabilitation unless the court "is reasonably satisfied *both* that it knows why a particular crime was committed *and* that the conditions leading to the criminal act will not recur — either because the factors that led the defendant to commit the crime are readily correctable or because the defendant's criminal conduct resulted from unusual environmental stresses unlikely ever to recur." *Beltz*, 980 P.2d at 481 (emphasis added). [5] *See also Scholes v. State*, 274 P.3d 496, 501 (Alaska App. 2012).

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[3] *Ibid.*

[4] *Ibid.*

[5] Quoting *Lepley v. State*, 807 P.2d 1095, 1100 (Alaska App. 1991).

Given the sentencing judge's express finding that he did not know why Herring committed the acts of violence that gave rise to this case, we should have affirmed the judge's ruling on the issue of extraordinary potential for rehabilitation.

The remaining question presented to Herring's sentencing judge was whether it would be manifestly unjust to sentence Herring within the applicable presumptive range — in other words, whether even a sentence at the bottom of this range (20 years to serve) would be manifestly unjust. *See* AS 12.55.165(a).

In *Collins*, this Court held that, in prosecutions for sexual felonies, a defendant's case could be referred to the three-judge sentencing panel if the defendant showed by clear and convincing evidence "either that the defendant does not have a history of unprosecuted sexual offenses, or that the defendant has prospects for rehabilitation which, in other offenders, would be considered 'normal' (or 'good')." *Id.*, 287 P.3d at 797.

Although we earlier directed the superior court to reconsider this issue in light of *Collins*, we now conclude that, given the facts of Herring's case, we should have simply affirmed the superior court's decision. Even assuming that Herring met the criteria we identified in *Collins*, we should have upheld the superior court's conclusion that it was not manifestly unjust to sentence Herring within the applicable presumptive range of 20 to 30 years' imprisonment.

As we explained earlier in this opinion, even though Herring's plea bargain allowed him to resolve this case by pleading guilty to a single count of first-degree sexual assault, as a factual matter Herring committed the separate offense of kidnapping (an unclassified felony with a maximum punishment of 99 years' imprisonment), and he committed several other acts of sexual assault against his ex-wife over the course of more than an hour. Herring did all of this only five days after leaving a mental health treatment facility against medical advice.

In light of these circumstances, even though the superior court indicated that Herring had a high potential for rehabilitation, and even if we assume that Herring had never committed sexual assault before, we now conclude that the superior court was not clearly mistaken when the court concluded that it would not be manifestly unjust to sentence Herring to a term of imprisonment within the applicable presumptive range of 20 to 30 years' imprisonment.

Conclusion

The superior court was not clearly mistaken when it rejected Herring's request to refer his case to the three-judge sentencing panel. Accordingly, the judgement of the superior court is AFFIRMED.